Jurisdictional Statement

81-1183

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

No. _____

October Term, 1981

Southern State College, et al.....*Appellants*

V.

Arkansas Gazette Company.....*Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

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December 22, 1981

QUESTION PRESENTED

Whether the application of a state statute, the Arkansas Freedom of Information Act, Ark. Stat. Ann. §12-2804 (Repl. 1979), by the Supreme Court of Arkansas to require public disclosure of reports containing financial aid information regarding student athletes exchanged between ten colleges as members of the Arkansas Intercollegiate Athletic Conference (and provided to a conference commissioner) is consistent with or constitutionally valid in light of a federal statute, the Family Education and Privacy Act of 1974, 20 USCS §1232g, which prohibits the public release of education records.

LIST OF PARTIES

APPELLANTS

Arkansas College
Arkansas Tech University
College of the Ozarks
Harding University
Henderson State University
Hendrix College
Ouachita Baptist University
Southern Arkansas University (Formerly Southern State College)
University of Arkansas at Monticello
University of Central Arkansas
Dr. Cecil McDermott, President (Past), Arkansas Intercollegiate Athletic Conference
Harry T. Hall, Commissioner, Arkansas Intercollegiate Athletic Conference

APPELLEE

Arkansas Gazette Company

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No. _____

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Southern State College, et al.....*Appellants*

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas, which appears in the Appendix at pages A-1 through A-4, *infra*, is reported at 273 Ark. 248, 620 S.W.2d 258 (1981). The judgment of the Pulaski County Circuit Court, which is not reported, appears in the Appendix at page A-4, *infra*.

JURISDICTION

This appeal is from the final judgment of the Supreme Court of Arkansas holding that the Arkansas Freedom of

Information Act, Ark. Stat. Ann. §12-2804 (1979 Repl.) requires the public disclosure of the reports of ten college members of the Arkansas Intercollegiate Athletic Conference, containing information on student athletes exchanged between the schools and submitted to the conference commissioner, and that these records are not subject to the Family Education Rights and Privacy Act of 1974, 20 USCS §1232g.

The judgment of the Supreme Court of Arkansas was delivered on June 29, 1981. See Appendix, Page A-1, *infra*. A timely petition for rehearing was entertained and denied on September 28, 1981. See Appendix, Page A-6, *infra*. A notice of appeal to this Court was duly filed in the Supreme Court of Arkansas on December 15, 1981. See Appendix, Page A-7, *infra*.

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 USCS §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article 6, §2, United States Constitution

This Constitution, and the laws of the United States which shall be made in pursuance thereof.... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Family Educational Rights and Privacy Act of 1974
20 USCS §1232g.

(a) (3) For the purposes of this Section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term 'education records' means ... those records, files, documents, and other materials which —

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

* * *

(6) For the purposes of this section, the term 'student' includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution

(b) (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following:

(A) Other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

* * *

(D) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(E) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

Regulations of The Department of Health, Education and Welfare 45 CFR 99.1 et. seq.

Privacy Rights of Parents and Students.

§99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

* * *

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational

purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

§99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under Section 438 of the General Education Provisions Act, as amended.

§99.3 Definitions.

* * *

"Disclosure" means permitting acess or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in §99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

* * *

§99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of Section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in §99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

Ark. Stat. Ann. §12-2801 (1979 Repl.):

Title of Act - This Act [§§12-2801 - 12-2807] shall be known and cited as the "Freedom of Information Act" of 1967.

Ark. Stat. Ann. §12-2803 (1981 Supp.):

Definitions. — "Public records" are writings, recorded sounds, films, tapes, or data compilations in any form (a) required by law to be kept, or (b) otherwise kept and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds.

All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records. Provided, that compilations, lists, or other aggregations of information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, are

hereby determined to be confidential and shall not be considered to be "public records" within the terms of this Act [§§12-2801 - 12-2807], and shall not be supplied to private individuals or organizations.

* * *

Ark. Stat. Ann. §12-2804 (1979 Repl.):

Examination and copying of public records. — Except as otherwise specifically provided herein, by laws now in effect, or laws hereinafter specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records. It is the specific intent of this Section that State income tax returns; medical, scholastic, and adoption records; the site files and records maintained by the Arkansas Historic Preservation Program and the Arkansas Archeological Survey; grand jury minutes; unpublished drafts of judicial or quasi-judicial opinions and decisions; undisclosed investigations by law enforcement agencies of suspected criminal activity; unpublished memoranda, working papers, and correspondence of the Governor, Legislators, Supreme Court Justices, and the Attorney General; documents which are protected from disclosure by order or rule of court; files which, if disclosed, would give advantage to competitors or bidders; and other similar records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this Act [§§12-2801 - 12-2807].

Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy such records shall not be denied to any citizen.

* * *

STATEMENT OF THE CASE

Congress has adopted the Family Education Rights and Privacy Act of 1974; P.L. 90-247, Title IV, Section 438, as amended; 20 USCS §1232g, also popularly referred to as the "Buckley Amendment". The act serves two functions. First, it provides access to student records by students and their parents. Second, it establishes the privacy of those records. It threatens to cut off public funds to any educational agency or institution which discloses, except as permitted by the act, "education records" of students. "Education records" are defined as:

> . . . those records, files, documents and other materials which—
>
> (i) contain information directly related to a student; and
>
> (ii) which are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 USCS §1232g (a) (4) (A).

All ten appellant colleges and universities administer federal financial aid programs, including the Basic Educational Opportunity Grants Program ("BEOG"), Title 4-A-1 of the Higher Education Act of 1965, as amended, and are subject to the Buckley Amendment.

The ten appellant schools are members of the Arkansas Intercollegiate Athletic Conference ("AIC"). Five of the schools are primarily supported by state funds and five are primarily supported by private funds. The AIC is governed by a constitution and by-laws. Appendix A-9, *infra*. Each institution designates a faculty member who serves as its AIC representative. One of the representatives holds the position of president for one year and the office rotates each year to another school's representative.

The stated purpose of the AIC is to foster education of the students of the member schools by promoting bodily health through the formation and regulation of intercollegiate athletic programs. This purpose is accomplished in part by restrictions on the eligibility of students for athletic programs and by limits on the amount of financial aid which may be received by any student athlete.

Each AIC representative is required to submit annually to the other AIC representatives and to the AIC commissioner an academic eligibility list and a report of the financial aid received by any eligible student athlete. The financial aid report is entitled "AIC Report of Aid to Athletes" and is required to be submitted on July 15 of each year. The report contains the name of each eligible student athlete and any aid received by the student for each semester divided into the following categories:

AIC Grants
Work
Loans
BEOG/SEIG/EOG (Government Programs)
Other Grants and Aid

The AIC commissioner is employed by the conference. Among the duties of the commissioner set forth in the AIC constitution are to keep the conference records and to act to determine facts in questions of eligibility of players, violations of the conference rules, and to issue rulings regarding them. Article VII, Section 4, AIC constitution. Appendix, page A-9, *infra*.

The Arkansas Gazette Company ("Gazette"), a daily newspaper of general circulation in the state of Arkansas, requested, under the Arkansas Freedom of Information Act, Ark. Stat. Ann. §12-2804, that the appellants produce for inspection the reports regarding the financial aid

received by student athletes for the years 1976 through 1979. The appellants refused and on April 7, 1980 the Gazette filed a petition for declaratory judgment in the Pulaski County, Arkansas, Circuit Court to have the reports declared to be subject to disclosure under the state statute. Following a preliminary hearing, the Gazette named all ten schools, the then president of the AIC, Dr. Cecil McDermott, and the AIC commissioner, Harry T. Hall, as parties to the action. The Attorney General for the State of Arkansas responded for the schools primarily supported by state funds and private counsel, H. William Allen, responded on behalf of the privately supported colleges, Dr. McDermott and Mr. Hall.

The applicability of 20 USCS §1232g to the records sought under the state statute was raised in the Pulaski Circuit Court from the outset, particularly in the initial motion to dismiss filed on behalf of Dr. Cecil McDermott and Harry T. Hall on April 28, 1980. That motion and supporting memorandum brief cited 20 USCS §1232g, stating that it required the records sought by the Gazette to be closed to the public.

On November 7, 1980 the Pulaski Circuit Court entered a judgment ruling that the records sought by the Gazette are education records required to be closed to the public by 20 USCS §1232g. The Gazette appealed to the Supreme Court of Arkansas on the basis that federal law does not apply to the AIC. The Supreme Court of Arkansas reversed and remanded in an opinion delivered June 29, 1981, holding that the records must be disclosed under the Arkansas Freedom of Information Act and that 20 USCS §1232g does not apply to the AIC as it is not an educational agency or institution. The opinion of the Supreme Court of Arkansas is at Appendix, page A-1, *infra*. The appellants here filed a petition for rehearing and reiterated the argument that the application of state law to make these records public offends federal law. The petition was denied by the Supreme Court of Arkansas on September 28, 1981. Appendix, page A-6,

infra. It is from this final judgment of the Supreme Court of Arkansas that this appeal is taken.

THE QUESTION IS SUBSTANTIAL

The issue of whether the Family Education Rights and Privacy Act of 1974, 20 USCS §1232g applies to the student records in this case presents a substantial question. The intent of the act will be thwarted if the holding of the Supreme Court of Arkansas denying its applicability to this case is allowed to stand. The effect of the holding is to override a federal statute with a state statute in violation of the supremacy clause of the United States Constitution, Article 7, §2.

Almost every institution of higher education in the United States with an athletic program combines in athletic conferences in voluntary joint efforts with other institutions to regulate competitive sports. To assure basic educational standards and to control the use of the financial aid, schools have considered it desirable for such self regulation to exchange personal student information regarding financial aid.

The Supreme Court of Arkansas and the Gazette do not contest the fact that the AIC financial aid reports fall within the definition of education records in 20 USCS §1232g. The Supreme Court of Arkansas held that while the member institutions are subject to the act, the AIC is not, stating that it is not an educational agency or institution as defined by the act. As indicated by the manner in which this suit was brought, i.e., all ten colleges were made defendants along with the (then) AIC president and the AIC commissioner, the AIC is not an independent corporation but simply an association of member schools. The Supreme Court of Arkansas, in effect, has ruled that while the records are protected by the federal act within the institutions, their collective possession of a set of those records in a conference office removes that protection and makes at least that set open to public inspection.

This is a case of first impression. It involves a determination of the applicability of the federal statute to the facts in this case. There is no helpful case law interpreting the federal act. We must look simply to its language for the answer.

It is clear that 20 USCS §1232g contemplates that education records may be maintained outside an institution as long as the education records are held by someone acting for the institution. The act defines education records as:

> . . . Those records, files, documents, and other materials which—
>
> (i) contain information directly related to a student: and
>
> (ii) are maintained by an educational agency or institution *or by a person acting for such agency or institution.*

20 USCS §1232g (a) (4) (A) (Emphasis supplied). The maintenance of the AIC reports by the AIC commissioner is solely for the benefit of these ten educational institutions. The AIC commissioner is unquestionably "acting for" these institutions in the performance of all his official functions.

Another provision of 20 USCS §1232g reflects that it contemplates that education records may be held outside an institution under certain circumstances:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their

parents to any individual, agency, or organization, other than to the following—

> (A) *Other school officials,* including teachers within the educational institution or local educational agency, *who have been determined by such agency or institution to have legitimate educational interests . . .*

20 USCS §1232g (b) (1) (Emphasis Supplied).

The above quoted provision contemplates some permissible disclosure outside the educational institution by using the language "other school officials, including teachers within the . . . institution . . . ". If Congress had intended to limit permissible disclosure to persons within the institution, it would have modified both school officials and teachers as being "within the institution." The further language, "school officials . . . who have been determined by such agency or institution to have legitimate educational interests . . . " clarifies that it is *the institution* which decides what "other school officials" have legitimate educational interests. It is obvious from the purpose of the AIC outlined in its constitution that the institutions creating it determined that it has "legitimate educational interests".

The act provides no definition of "school official". The testimony of Dr. Cecil McDermott, the then president of the AIC, at a hearing on October 27, 1980 supports the reasonable conclusion that the AIC commissioner is a school official:

By Mr. Allen:

> Q. Dr. McDermott, would you consider the persons to whom this report is distributed, both those persons working in the AIC

office and those in the other institutions as school officials?

A. Yes, definitely.

Record, Page 87.

Thus, a proper reading of 20 USCS §1232g combined with the facts of this case leads to the conclusion that the federal statute does cover and protect the records in question, including the set maintained by the AIC commissioner. Accordingly, the Supreme Court of Arkansas has permitted the disclosure of these records under an Arkansas statute in violation of the requirements of a federal statute. The federal question is both clear and substantial.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellants

APPENDIX

SUPREME COURT OF ARKANSAS

No. 81-90

Opinion Delivered June 29, 1981

ARKANSAS GAZETTE COMPANY

Appellant,

Appeal From Pulaski Circuit Court; Ralph M. Cloar, Special Judge.

V.

SOUTHERN STATE COLLEGE, ET AL,

Appellees,

Reversed and Remanded.

ROBERT H. DUDLEY, Associate Justice

The appellant, Arkansas Gazette Company, brought suit against the Arkansas Intercollegiate Athletic Conference seeking to compel the AIC to disclose the amount of money that its member institutions had disbursed to student athletes during the last school year. The lower court denied appellant access to the AIC financial records on the basis that the records were "educational" and were required by law to be closed to the public pursuant to the Arkansas Freedom of Information Act, Ark. Stat. Ann. §12-2804 (Repl. 1979) and The Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. §1232g.

The AIC is composed of ten Arkansas colleges and universities - five public and five private. It is governed by a constitution and by-laws which require the members to submit an annual report detailing the amount of money

disbursed to student athletes. The stated purpose is to control the subsidization of athletes. In *North Central Association of Colleges v. Troutt Brothers*, 261 Ark. 378, 548 S.W.2d 825 (1977), we held that a voluntary association of publicly supported educational institutions was subject to the Freedom of Information Act even though the association business was conducted through a private non-profit corporation. Similarly, each of the ten member institutions currently pays $2,800 in annual dues to this voluntary association of colleges and universities. The dues paid by the state supported institutions are from public funds. Therefore the AIC is partially supported by public funds.

The AIC cites *McMahan v. Board of Trustees of University of Arkansas*, 255 Ark. 108, 499 S.W.2d 56 (1973), where we found the Freedom of Information Act did not apply to lists kept by the athletic department of people who were issued complimentary football tickets. However, in 1973, the act only required the disclosure of records which by law were required to be kept and maintained. Since that date the General Assembly has amended the act to include records required to be kept or

> ....(b) otherwise kept and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. §12-2803.

This addition to the act clearly applies to the AIC and thus the records are public ones. The public has a fundamental right of access to public records. This right is the general rule and secrecy is the exception.

The AIC asks us to construe the act in such a way that these records fall within the "scholastic" exception. "Whether a statute should be construed narrowly or

broadly depends upon the interests with which the statute deals . . .[and] statutes enacted for the public benefit are to be interpreted most favorably to the public . . . the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved." *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). Accordingly, we interpret the language of this exception to be limited to individual education or academic records, and we do not construe it to include information concerning the amount of money paid to student athletes. The appellant Gazette has specifically deleted from its request any information about individual scholastic records.

The AIC contends that the records contain confidential information which would violate a student's reasonable expectation of privacy if released to appellant. No student has claimed a right of privacy and the standing of the AIC to assert the athlete's claim is doubtful. Even so, we have considered the argument and dismiss it. The AIC report contains the student's name, the amount paid to him through an AIC grant, the amount paid to him for work, the amount loaned to him, the amount paid to him through three federal and state grants (BEOG, SEIB [sic] and EOG), the amount paid to him through other grants, the amount of other financial aid given to him and the amount of notes he may have signed for any of the above. An application by the student for any of the above listed grants or loans is confidential and is not included in the AIC report. The amount of money distributed from the member institution to the student athlete from any of the above sources is the only information contained in the report and is the only information sought. No one has a reasonable expectation of privacy concerning the amount of public funds dispersed to him unless that person clearly comes within one of the exceptions which by law are required to be closed to the public.

The AIC contends, and the trial court held, that the records sought are "educational records" required to be closed to the public under The Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. §§1230-1232i. We disagree. The AIC is not an educational agency or institution subject to the authority of the Federal Commission of Education as defined by the act, §1232g (a)(3), and is not subject to the act. However, the member institutions are subject to the authority of the Commission and they have been supplying records to the AIC which conceivably are "education records" which are "personally identifiable" as described by §1232g (4)(A). If the colleges and universities have breached the federal act that breach has already occurred and those member institutions cannot now claim that they should not have supplied the information to the AIC. The records sought are not required by law to be closed to the public.

Reversed and remanded.

Hays, J., not participating.

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

ARKANSAS GAZETTE
COMPANY PLAINTIFF

V. NO. 80-2048

ARKANSAS POLYTECHNIC COLLEGE, HENDERSON STATE UNIVERSITY, SOUTHERN STATE COLLEGE, UNIVERSITY OF ARKANSAS AT MONTICELLO, UNIVERSITY OF CENTRAL ARKANSAS, ARKANSAS COLLEGE, COLLEGE OF THE OZARKS, HARDING COLLEGE, HENDRIX COLLEGE, and QUACHITA BAPTIST

UNIVERSITY, Members of the ARKANSAS INTERCOLLEGIATE ATHLETIC CONFERENCE, An Unincorporated Association; DR. CECIL McDERMOTT and HARRY T. HALL DEFENDANTS

JUDGMENT

This case was heard on October 29, 1980, by stipulation of the parties before Special Circuit Judge Ralph M. Cloar, Jr.; the plaintiff, Arkansas Gazette Company, being present by its attorney, Phillip Carroll of the Rose Law Firm; and defendants Arkansas College, College of the Ozarks, Harding College, Hendrix College, Ouachita Baptist University, Dr. Cecil McDermott and Harry T. Hall, by their attorney, H. William Allen of Wright, Lindsey & Jennings; and defendants Arkansas Polytechnic College [Arkansas Tech University], Henderson State University, Southern State College [Southern Arkansas University], University of Arkansas at Monticello and University of Central Arkansas, by their attorney, Nelwyn Davis, Assistant Attorney General for the State of Arkansas; and the Court upon the pleadings, testimony, arguments of counsel and other matters before the Court, being well and sufficiently advised, finds:

The records sought to be obtained from the defendants by the plaintiff in its petition for declaratory judgment under Ark. Stats. Ann. §12-2804 of the Arkansas Freedom of Information Act of 1967, as amended, are not subject to inspection by the plaintiff under this statute for the reason that the statute specifically excludes records which by law are required to be closed to the public, and the records sought are "educational records" required to be closed to the public under The Family Education Rights and Privacy Act of 1974, 20 USCS 1232g *et seq.*

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff's petition be dismissed with prejudice and

a judgment be and hereby is awarded to the defendants on the petition and for their costs.

/s/ Ralph Cloar, Jr.
Special Circuit Judge

Date: 10-29-80

THIS ORDER OR JUDGMENT HAVING BEEN INADVERTENTLY OMITTED OF RECORD ON 10-29-80 IS ENTERED NUNC PRO TUNC.

/s/ Ralph Cloar, Jr.
Special Circuit Judge

11-7-80
Date

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

September 28, 1981

Nelwyn Leone Davis
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Re: 81-90 The Arkansas Gazette Company
v. Arkansas Tech University et al

Attorneys of Record:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

/s/ Donna L. Williams

Dona L. Williams
Clerk

DLW:rh

cc: Phillip Carroll
Jacque Alexander

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS GAZETTE COMPANY — Appellant

V. NO. 81-90

SOUTHERN STATE COLLEGE, et al — Appellees

NOTICE OF APPEAL

Notice is hereby given that the appellees hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas, entered in this action on September 28, 1981.

This appeal is taken pursuant to 28 USCS §1257(2).

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By H. William Allen
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Attorneys for Appellees

CERTIFICATE OF SERVICE

On December 14, 1981, a copy of the foregoing Notice of Appeal was today served by mail on Phillip Carroll, Rose Law Firm, 120 East Fourth Street, Little Rock, Arkansas 72201, attorney for appellant.

/s/ H. William Allen
H. William Allen

EXCERPTS FROM THE CONSTITUTION AND BY-LAWS OF THE ARKANSAS INTERCOLLEGIATE ATHLETIC CONFERENCE

ARTICLE II – PURPOSE

The purpose of this conference shall be to promote and to foster education of the students of the member colleges situated in the State of Arkansas by promoting and encouraging bodily health through intercollegiate athletic programs, and by providing a non-profit and non-political organization for the formation and regulation of all such intercollegiate programs.

ARTICLE III

SECTION 2 – Representation. The official AIC representative shall be a member of the teaching faculty and of the athletic committee of the college, and not connected with the athletic department either as a coach or athletic Director.

* * *

ARTICLE VII – COMMISSIONER

Section 1. Employment

The AIC shall employ a commissioner at a salary to be agreed upon by the conference. The executive committee shall serve as contact representatives of the conference in the employment of a commissioner by the conference. This committee shall direct the work of the commissioner for the conference. The commissioner shall make all reports to the committee.

* * *

Section 4. Responsibility of Commissioner

The commissioner shall attend all meetings and shall receive, inspect, and file all reports required by the by-laws. He shall keep the conference records and make annual reports. He shall act to determine the facts in all requests for by-law interpretations, questions of eligibility of players, violations of the conference rules, may issue rulings, or may furnish these facts to the executive committee and recommend that they be presented to the entire conference when he feels it necessary.

Section 5. Appeal of the Commissioner's Decision

If and when the commissioner rules against any member of the conference, the affected member has the right to appeal the commissioner's decision to the executive committee.

* * *

ARTICLE IX

SECTION 1. — Discipline of Members

(a) Disciplinary powers of the AIC shall be vested in the faculty representatives. The faculty representatives may impose penalties on any member college in any sport for any length of time. The penalties include ruling on eligibility of players, forfeiture of games, and probation, suspension, or expulsion of member institutions. A member institution on probation must continue playing a full conference schedule, but may not compete for conference championships. A suspended member institution is eliminated from all conference competition.

BY-LAWS

ARTICLE II—SUBSIDIZATION

Section 1.

The maximum grant-in-aid which any athlete may receive from funds which are controlled in any manner by the college or from funds provided by churches, clubs, civic organizations, schools, corporations, or individuals other than parents or guardians shall not exceed tuition, fees, and room and board during the regular academic year. A married student living on campus shall not receive aid in excess of the rate for an unmarried student living on campus. An athlete living off campus cannot receive more than $700 in lieu of room and board. It is optional with the college as to whether each athlete is to receive the maximum amount and as to how the grant-in-aid is to be administered. No AIC member institution shall pay athletes for regular or summer work at rates higher than those paid any other student for the same type of work. Books and instructional material shall be considered as aid to athletes. The cost of room and board of athletes who engage in legal athletic practice or competition when the college is not in session shall not be considered as aid to athletes. Loans to students are not to be considered a part of the student-athlete's financial aid package. However, the loan must be administered by the college financial aids office, or other recognized lending institutions, and be available to any student. The type and amount of all college administered loans must be shown on the annual student-athlete financial aid report.

* * *

Section 5.

By July 15 following the end of each school year, each member institution shall furnish to the commissioner and the faculty representatives a list of the amount paid for any

purpose during that year to each student who has been included on the eligibility list for any sport. This report shall show the amount paid each student during each semester or term.

This list shall show the kind and amount of any loan received by each student who has been included on an eligibility list from that institution during the preceeding academic year.

Motion to Dismiss or Affirm

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IN THE

Supreme Court Of The United States

No. 81-1183
October Term, 1981

Southern State College, et al ..... *Appellants*

V.

Arkansas Gazette Company ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS APPEAL OR TO AFFIRM

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MOTION TO DISMISS APPEAL - NONCOMPLIANCE

The appeal should be dismissed for the following reasons:

(a) The decision below does not draw in question the validity of the Arkansas Freedom of Information Act on the grounds of being repugnant to the Family Education Rights and Privacy Act of 1974, 20 USCS §1232g, (the Buckley Amendment) and this Court therefore lacks jurisdiction under 28 USCS §1257 (2).

(b) The federal question sought to be reviewed was neither timely or properly raised, nor was it expressly passed on.

(c) The appeal does not present a substantial federal question.

(d) The judgment of the Arkansas Supreme Court rests on an adequate non-federal basis.

MOTION TO AFFIRM

In the alternative, the judgment should be affirmed because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

THE STATE AND FEDERAL STATUTES ARE NOT REPUGNANT TO ONE ANOTHER AND THE FEDERAL QUESTION WAS NEITHER RAISED NOR PASSED ON. Nowhere in the pleadings filed in the trial court is there any reference to the "Buckley Amendment." Contrary to the suggestion made in the middle of Page 10 of appellants' jurisdictional statement, the Motion to Dismiss of Messrs. McDermott and Hall filed April 28, 1980 makes no mention of the Buckley Amendment, although an accompanying memorandum brief does state that the Arkansas Freedom of Information Act (Ark. Stat. Ann. §12-2804) provides that it does not apply to "records which by law are required to be closed to the public" and "Federal law prohibits disclosure of 'educational records.'" [Citing 20 USCS 1232g] Appellants argued that the Arkansas FOI Act and the Buckley Amendment were consistent with one another rather than repugnant. Nowhere in any pleading or brief filed below is there any reference to the supremacy clause of the U.S. Constitution, Article 6, §2, nor is there any issue raised concerning a conflict between the state and federal statutes. Neither the trial judge nor the Arkansas Supreme Court held the Arkansas FOI Act valid in the face of an attack upon it upon any grounds. The Act was not attacked at all! The Arkanas Supreme Court simply held that the Buckley Amendment does not apply to the Arkansas Intercollegiate Conference and that the federal law could not be piggybacked onto or made a part of the Arkansas FOI Act which does apply to the AIC.

The trial judge had adopted appellants' theory that when the Arkansas Legislature carved out an exception in its FOI law for "records which by law are required to be closed to the public," it intended to delegate to the Congress the right to enact exceptions. Of course, this ignored the well-established principle that the Legislature could not delegate its legislative power to a federal agency or even to another state agency. Arkansas Constitution, Article 4; *Arkansas S & L Assn. Bd. v.*

W. Helena S & L, 260 Ark. 326, 538 S.W.2d 760 (1976); *Walden v. Hart*, 243 Ark. 650, 420 S.W.2d 868 (1967); *Oates v. Rogers*, 201 Ark. 335, 144 S.W.2d 457 (1940). At the level of the Arkansas Supreme Court, appellant did not argue the repugnancy of the Arkansas FOI to the Buckley Amendment either in their original brief or in their petition for rehearing. There, appellants contended that the AIC was merely "acting for" the ten member institutions in receiving and distributing among its members the financial data concerning payments to athletes, and that the Buckley Amendment prohibited the disclosure of the information all as contemplated by the Arkansas FOI Act. The Arkansas Supreme Court did not rest its decision upon repugnancy of the state statute to the Buckley Amendment nor on any federal basis. Neither did it, as appellants accuse, override a federal statute with a state statute in violation of the supremacy clause of the United States Constitution. The Supreme Court held that the Arkansas FOI Act applied to the AIC because the latter is partially supported by public funds. It also held that no one had a reasonable expectation of privacy concerning the amount of public funds disbursed to him unless specifically shielded by a statute. This finding is not challenged here. Finally, it concluded that the AIC is not an educational agency or institution subject to the authority of the Federal Commission on Education and was therefore not subject to the Buckley Amendment. This finding is not surprising since §1232 g (a) (3) of the Federal Act defines "'educational agency or institution" as "any public or private agency or institution which is the recipient of funds under any applicable program." The AIC receives no federal funds. The member institutions are subject to the Act and they may have violated it by supplying education records which are personally identifiable to the AIC without express written permission of the athletes. No athlete contends his rights under the federal act have been violated and the Commission has not threatened to withhold funds from any member because it has supplied the information to the AIC. The only sanction contained in the Buckley Amendment for

a violation of its nondisclosure provisions is the withholding of federal funds; but, as previously stated, the AIC does not receive any federal money.

Appellants argue that the Buckley Amendment (20 USCS §1232g) authorized transmittal of the financial data concerning athletes to the AIC with the following language:

> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any . . . organization, other than to the following:
>
> (A) Other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have a legitimate educational interest."

The Arkansas Supreme Court properly concluded that the AIC was not an "other school official . . . within the educational institution . . . ." This does not constitute the overriding of a federal statute with a state statute. The federal statute is merely inapplicable. The contention that the applicable statute was used to override the federal statute is made for the first time on this appeal; and, therefore, the appeal should be dismissed. *Cardinale v. State of Louisiana*, 89 S.Ct. 1161, 394 U.S. 437, 22 L.Ed.2d 398 (1969); *Tacon v. State of Arizona*, 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346 (1973).

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. The only federal issue involved is whether or not the Buckley Amendment applies to the AIC. It was held that it does not, and the holding is perfectly logical. The AIC is not an educational agency or institution receiving federal funds. As a matter of fact, the money paid to

athletes by the various member institutions, the amounts of which are undisclosed to newspapers but in which are known by so many people in AIC institutions, may not come from federal sources. There are state and privately funded scholarships, salaries paid by the institutions for such things as emptying wastebaskets, free room and board provided by the schools or by alumni, student loans, and any number of emoluments available for top athletes. It is the public policy of Arkansas that records showing disbursements of organizations which are supported by public funds shall be available for inspection by any citizen. No athlete has intervened and claimed a right afforded to him or her by the Buckley Amendment. There is no threat that funds will be cut off if the AIC furnishes the data sought by the Gazette. This case involves much ado about nothing insofar as the protection of privacy of student athletes is concerned. If the issue of applicability of the Buckley Amendment to the AIC is to be raised, it should be by writ of certiorari pursuant to 28 USCS §1257 (3) asserted by a party with standing.

Respectfully submitted,

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Appellant's Reply Brief

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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ARGUMENT

In its motion to dismiss appeal or to affirm, appellee states on page 3 that "the state and federal statutes are not repugnant to one another and the federal question was neither raised nor passed on".

In support of its position that repugnancy was never raised, the cases of *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969); *Tacon v. State of Arizona*, 410 U.S. 351 (1973), are cited. In neither of these cases was a federal question raised below. Yet the appellee acknowledges on page 3 that, in the instant case, at least some of the appellants raised the controlling nature of 20 USCS 1232g and argued that

"federal law prohibits disclosure of 'educational records' " as early as their initial filing before the trial court.

As to the question of repugnancy, it is possible to construe the federal act consistent with the Arkansas Freedom of Information Act (Ark. Stat. Ann. §12-2804) due to a provision in the state act that it does not apply to "records which by law are required to be closed to the public" and the trial court so held. Accordingly, the trial court ruled federal law applied but avoided having to make a specific federal supremacy ruling. It is spurious to argue that the fact that the state statute has a provision that can be read to accommodate a federal statute (which without the provision is in conflict with the federal statute), destroys the criteria for appeal that the two laws are repugnant. In this case the state law provision excepting records "which by law are required to be closed to the public" is clear acknowledgement that the two laws are in conflict.

The Supreme Court of Arkansas in reviewing the trial court's decision avoided not only the supremacy issue but also the question of conforming the two statutes via the exception in the state statute. It held instead that the federal statute, while applicable to the records, was not applicable to the AIC. This construction has the indirect but practical effect of overriding the federal statute with the state statute. Such a maneuver by the Supreme Court of Arkansas should not be allowed to divest the appellants of a direct appeal to this Court. An erroneous failure to pass upon the federal conflict with a state statute has been treated by this Court as the equivalent to a finding of validity of the state statute so that an appeal will lie.

Lawrence v. State Tax Comm., 286 U.S. 276, 282-283 (1932). It should be so held in this case.

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